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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 398

HOWARD FRANKLIN COBB,
MAURICE F. STEHMAN,

Petitioners

v

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Palmer K. Ward
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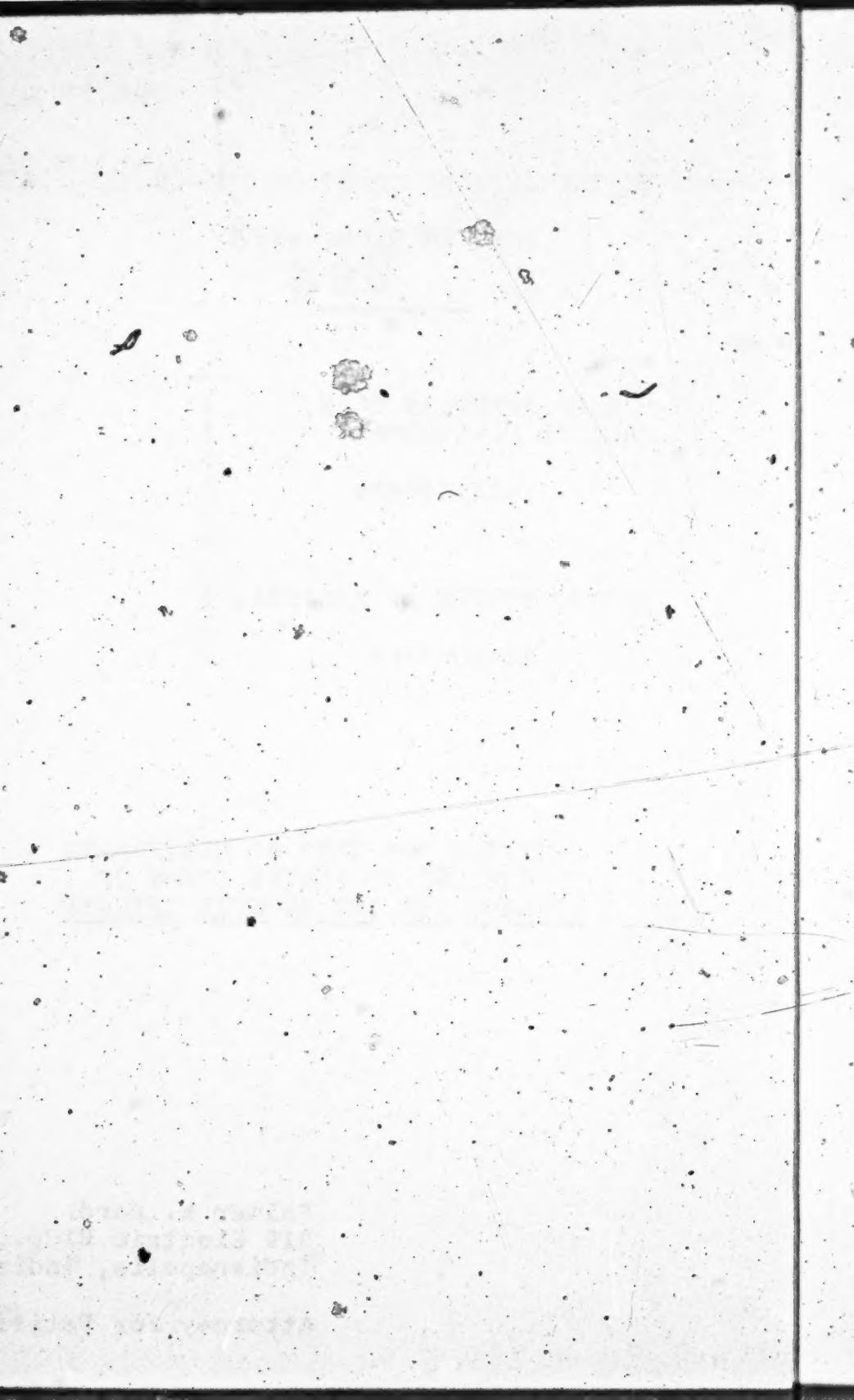

I N D E X

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	3
Constitutional Provisions	4
Statement of the Case	4
Argument	7
Appendix "A"	
Court of Appeals for the Seventh Circuit-	1
Appendix "B"	
Judgment of trial Court	7

Citations:

5th Amendment, U. S. Constitution	4
McHale v United States, 6-11-68 United States Court of Appeals for the District of Columbia	8
Roe v United States(1963) 316 F. (2)9 617 (C. A. 5)	

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said conviction being affirmed by the United States Court of Appeals on June 10, 1968 and the petition for rehearing being denied on July 12, 1968.

OPINION OF THE UNITED STATES COURT OF APPEALS

The opinion of the United States Court of Appeals for the Seventh Circuit has not been officially reported but it reproduced herein in Appendix "A" to this petition.

JURISDICTION

1. The judgment of the United States Court of Appeals for the Seventh Circuit was entered on June 10, 1968.

2. A timely Petition for Rehearing was filed and overruled by the Court on July 12, 1968.

3. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1254 (1).

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2. A timely Petition for Rehearing was filed and overruled by the Court on July 12, 1958.

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QUESTIONS PRESENTED

1. Is the introduction into evidence of oral testimony as well as documentary evidence of matters and facts occuring after the dates fixed in the indictment concerning events in another jurisdiction, without cautionary instructions to the jury, either at the time the evidence was offered or exhibits admitted, or in the Court's general instructions prior to deliberation, so prejudicial to petitioners that they were denied due process of law as guaranteed by the Constitution of the United States?

2. Is the failure of the trial Court to permit the jury to have the exhibits and instructions with them at the time of their deliberations a denial of due process of law when the jury was permitted to have with them the indictment during their deliberations?

CONSTITUTIONAL PROVISIONS

United States Constitution, Fifth Amendment:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

Petitioners, and others, were charged with twelve offenses against the mail fraud statute in twelve counts and with one count of conspiracy to violate the mail fraud statute. They were found guilty by a jury and sentenced to serve a total of seven years imprisonment said judgment being reproduced herein in Appendix "B" to this petition.

CONSTITUTIONAL PROVISIONS

United States Constitution,
Fifth Amendment:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

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The twelve substantive counts alleged eleven separate mailings and one receipt of mail and covered the period from May 1, 1965 to March 1, 1966, all the transactions alleged to have taken place in Quincy, Illinois and within the jurisdiction of the United States District Court for the Southern District of Illinois. The conspiracy count alleged a conspiracy from May 1, 1965 to the date of the return of the indictment(April 26, 1966)all of said alleged overt acts being committed in Quincy, Illinois and within the jurisdiction of the United States District Court for the Southern District of Illinois. Federal jurisdiction is present because the indictment alleged violations of Title 18, United States Code, Sections 1341 and 371.

At the trial the Court permitted, over objections of the petitioners, testimony from government witnesses concerning alleged transactions in Richmond, Indiana

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At the trial the Court permitted, over objections of the petitioners, testimony from government witnesses concerning alleged transactions in Richmond, Indiana

which is in the jurisdiction of the United States District Court for the Southern District of Indiana and involved alleged transactions after the date set out in the indictment of March 1, 1966. The witnesses were William E. Kranzush, Claude A. Wolf and Erma Hettmanssperger and their testimony is set out in full in the Appendix to Petitioners brief filed in the United States Court of Appeals, for the Seventh Circuit at pages 53-70, inclusive. In each case timely objection was made and overruled and in only one case did the Court give a cautionary instruction and that was as to the testimony of the witness Hettmanssperger at page 70. In the final instructions to the jury the Court did not give any cautionary instructions concerning intent.

The jury did not have the instructions of the Court with them when they retired to deliberate. The record is silent as to whether the jury had the

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exhibits with them at the time the jury was deliberating. Petitioners contend they did not have said exhibits and the government does not concede that they did not have them while deliberating. Both sides agree that the jury had the indictment at the time of deliberation. Petitioners contend that they were denied a fair trial because the jury had a copy of the indictment and it is a denial of due process of law for them to have the indictment and not the Court's instructions and the exhibits, some of which were favorable to Petitioners.

ARGUMENT

The United States Court of Appeals by its decision in this case has approved the introduction into evidence of oral testimony as well as documentary exhibits of matters and facts that were not within the issues of the indictment. By this decision the Court of Appeals for the Seventh Circuit is in direct conflict

with a decision of the United States Court of Appeals for the District of Columbia, decided June 11, 1968 in the case of McHale v. United States. (This case is not presently reported but an abstract appears at 3 CrL 2235.)

In the McHale case the Court held:

> "Secondly, even if the subsequent acts have some relevance the question remains whether they were presented in such detail that Martin was in fact being tried for crimes not named in the indictment. The record indicates that most of the evidence against Martin concerned events subsequent to the mailing of the last count letter. This is clearly reflected in transcript version of the Government's summation to the jury. Over three of the five pages of summation deal with subsequent events."

We feel that the instant case is even stronger than McHale for the reason that the trial Court permitted into evidence matters that were not within the framework of the indictment but also matters that occurred after the indictment and in another jurisdiction.

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We feel that the instant case is even stronger than McHale for the reason that the trial Court permitted into evidence matters that were not within the framework of the indictment but also matters that occurred after the indictment and in another jurisdiction.

We feel that this case is within the teachings of Roe v United States(1963) 316 F. (2) 617 (C. A. 5) wherein the Court said:

> "The cut-off time would ordinarily run as late as the last piece of material bringing about the completed purchase."

Surely subsequent acts or conduct occurring at Richmond, Indiana and not within the jurisdiction of the United States District Court for the Southern District of Illinois could not be admissible concerning matters alleged to have occurred in Quincy, Illinois.

Secondly petitioners would submit that they were denied a fair and impartial trial because the jury in the instant case was permitted to have a copy of the indictment with them during their deliberations when they did not have the instructions nor the exhibits, some of which were favorable to the petitioners. Counel will concede that he has been unable to find any reported case which so halds. However it has been the practise in the United

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States District Court for the Southern District of Indiana so long as the undersigned has any memory that in all criminal cases the jury has had the indictment, instructions and exhibits with them at the time of deliberation. We feel that anything less is a denial of due process of law.

CONCLUSION

For the reasons herein stated we respectfully pray the Court to issue a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review their final judgment.

Respectfully submitted,

Palmer K. Ward
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Indianapolis, Indiana

Attorney for Petitioners.

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CONCLUSION

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Respectfully submitted,

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919 Electric Bldg.
Indianapolis, Indiana

Attorney for Petitioners.

In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1967 — JANUARY SESSION, 1968

Nos. 16301, 16302

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HOWARD FRANKLIN COBB and
MAURICE F. STEHMAN,
Defendants-Appellants.

Appeals from the District Court for Southern Illinois, Southern Division.

JUNE 10, 1968

Before SCHNACKENBERG, SWYGERT and FAIRCHILD, *Circuit Judges.*

FAIRCHILD, *Circuit Judge.* Howard F. Cobb, Maurice F. Stehman, Walter J. Kessler, and Gertrude M. Cobb were charged with 12 offenses against the mail fraud statute[1] and with conspiracy to violate it. Kessler was granted a separate trial and was a government witness at the trial of Mr. and Mrs. Cobb and Stehman. These three were convicted, and Mr. Cobb and Stehman have appealed.

The twelve substantive counts alleged eleven mailings and one receipt of mail, each for the purpose of executing a scheme to defraud, described in detail. Defendants do not challenge the sufficiency of the evidence.

[1] 18 U.S.C. sec. 1341.

Condensed and summarized, the scheme to defraud, alleged and proved, was as follows:

Defendants would create an identity for a sham retail business under the name of Kessler Furniture Galleries at Quincy, Illinois, induce a large number of firms to supply furniture on credit, dispose of the merchandise for cash through auction houses and like channels, conceal the proceeds, and disappear as soon as it seemed likely that further operation would be dangerous.[1]

Defendants' five contentions, and our dispositions of them, are as follows:

1. *Sufficiency of the indictment.* Defendants assert that the indictment is fatally defective in that the substantive counts fail to set out the contents of the mail matter. They say they were denied sufficient notice to enable them to prepare a defense or to identify the offense charged with sufficient certainty to be able to avoid second jeopardy.

It is true that the indictment neither quotes nor summarizes the text of the mail matter, but defendants have cited no authority that this is indispensable.

In each of Counts I through XI, the indictment charged a mailing, on or about a specified date, at Quincy, alleging in some instances that the matter was a letter and in others that it was a postal card. The name and address of each addressee were alleged. In Count XII, the indictment charged receipt from the post office at Quincy of a piece of certified mail. The number of the certified article, the name and address of the sender, and the name and address of the addressee were alleged.

Count I included a very detailed description of the scheme to defraud, and this material was realleged in each other count. Each count alleged that the mailing or receipt of mail was for the purpose of executing the described scheme. One part in the alleged scheme was furnishing a false financial statement to a named mercantile agency, and Count I alleged the mailing of a letter to that agency. The object of the alleged scheme was to obtain property by fraud from named suppliers, and the alleged scheme included ordering merchandise, promising

[1] See the "scam" described in *United States* v. *Wolcoff* (7th Cir. 1967), 379 F.2d 521.

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[1] See the "scam" described in United States v. Wolcoff (7th Cir. 1937), 375 F.2d 321.

payment, and making false representations. The addressees of the mail involved in Counts II through XI, and the sender in Count XII were all suppliers named in the description of the scheme.

Defendants did not seek a bill of particulars under Rule 7(f), F.R. Cr. P., nor inspection of the articles under Rule 16(b), F.R. Cr. P. We hold that the indictment adequately identified each piece of mail matter and sufficiently charged an offense in each count.

2. *Evidence of prior and subsequent transactions.* Defendants argue the court erred in admitting testimony as to so-called "pattern" transactions in other jurisdictions and at other times.

The indictment alleged that defendants devised their scheme for the Quincy operation on or about May 1, 1965 and continuously thereafter until on or about March 1, 1966. The earliest alleged mailing was July 20, the latest, November 18, 1965.

The government introduced evidence tending to show (1) that Cobb and Stehman had engaged in similar transactions under the name of Duvall Furniture Company in Denver, Colorado, shortly before they began the Quincy operation, and (2) that they commenced to be involved in others suggesting a similar pattern under the name of Brinkley's Town and Country Interiors at Richmond, Indiana in March and April, 1966.

The district court received this evidence for the limited purpose of showing intent and instructed the jury accordingly. The similarity of the Colorado and Indiana transactions tended to show, if any additional proof were needed, that the defendants, in doing the acts which they were shown to have performed in and about Quincy, intended to defraud in the manner alleged. Within reasonable limits, evidence of similar transactions is admissible for the purpose of establishing intent.[3] The Colorado transactions occurred very shortly before and the Indiana ones very shortly after the Quincy episode. We find no abuse of discretion in receiving evidence of either.[4]

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[3] *Nye & Nissen v. United States* (1949), 336 U.S. 613, 615, 93 L.Ed. 919, 924, 69 S.Ct. 766; *United States v. Shavin* (7th Cir. 1961), 287 F.2d 647, 652.

[4] See, with respect to acts occurring after the date of the offense rather than before, *Roe v. United States* (5th Cir. 1963), 316 F.2d 617, 621.

3. Alleged government impeachment of its own witness. Kessler, an indicted defendant, awaiting separate trial, was a very important government witness. Defense counsel asked him "with whom, if anybody, did you discuss the testimony that you've now given in this court room?" Kessler answered "No one." On re-direct, over objection, the United States attorney brought out testimony that Kessler had discussed the facts, before testifying, with the United States attorney and the postal inspector. He explained that by his answer to defense counsel he had meant that once he had started his testimony (the day before) he had not talked with anyone about it.

There is probably enough ambiguity in defense counsel's question so that the re-direct lay in the area of clarification rather than impeachment, and even if deemed impeaching, the government was surprised. The record shows, as it happens, that before defense counsel began his cross-examination (out of the presence of the jury) the United States attorney had given defense counsel notes of an interview with Kessler and the postal inspector had disclosed he had conversed with Kessler, but had no notes.

Eroding defense counsel's opportunity to argue that Kessler had denied the obvious could scarcely be reversible error, in any event.[5]

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[5] The writer's father, Edward T. Fairchild, formerly Chief Justice of the Supreme Court of Wisconsin, recorded an incident which occurred while he was studying law in an office in western New York in the 1890's. Part of the training was to handle cases before justices of the peace. He represented a defendant in a dispute over a lease of a pasture. . . .

"The case came on for trial before the justice of the peace and a jury of six men.

"My witness was not present when the trial started, but he came into the town hall just before the plaintiff had finished putting in his proof. While the jury was present I walked over to the witness and asked him about the six months agreement. He said that was understood. I asked him then to take the stand and the justice administered the oath. I asked him the relevant and material questions and he stated the situation to be as we claimed.

"On cross-examination by a young man who was studying law in a neighboring village, he was asked this question: 'Have you talked this matter over with Fairchild?' He answered, 'No sir.' Then the student asked, 'Didn't you just have, in the presence of all of us, a conversation with Fairchild about this matter?' 'No sir' he replied. 'He did speak to you, didn't he?' 'Yes' the witness said. 'What did Fairchild say to

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4. *Alleged failure to send exhibits to the jury room.* Counsel for both sides agree that the jury had the indictment while deliberating, and did not have a copy of the instructions. Although defendants suggest that it ought to be the practice to supply the jury with a copy of the instructions, the only decision they cite holds that such procedure is discretionary.[4] We are not prepared to rule otherwise.

Counsel for defendants asserts in his brief that the exhibits were not sent to the jury room. The record is silent. The government does not concede this fact and "presumes that the exhibits were available to the jury during their deliberations." The question was not raised in the district court. A presumption that the matter was properly handled is appropriate.

5. *Proof of venue.* The indictment charged that the mailings occurred, and in Count XII that an article of mail was received, at Quincy, Adams county, Illinois in the southern district of Illinois, southern division. Count XIII charged that defendants conspired there. There was evidence that the mailing and receipt of mail took place at Quincy and that other relevant activity of defendants occurred there. There happened to be testimony as to the location of Quincy with respect to the Mississippi river and Hannibal, Missouri, and jurors sitting in Springfield doubtless had knowledge of the approximate location of Quincy, a city of about 45,000. No witness testified, however, and the court did not instruct, on the basis of judicial notice, that Quincy is in the southern district of Illinois.

We take judicial notice that Quincy is in Adams county, that Adams county is part of the southern division of the southern district of Illinois, and that Quincy has been

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[3] (Continued)

you?' and he answered 'He told me to take the tobacco out of my mouth.'

"The jury laughed, the trial proceeded, and the verdict was for the defendant.

"The witness had been influenced by the common belief that one about to testify would destroy the effect of his testimony if he admitted that he had talked about the case with one of the parties in advance of the trial."

[4] *McDaniel v. United States* (5th Cir. 1965), 343 F.2d 785, 788.

designated by Congress as one of the places for holding court in that division.[7] Where, as here, the geographical location where offenses were committed has been sufficiently proved, and it can be judicially noticed that such location is within the appropriate district, venue has been sufficiently proved.[8]

The judgments will be affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

[7] 28 U.S.C. sec. 93(b)(2).

[8] *United States* v. *Karavias* (7th Cir. 1948), 170 F.2d 968, 970; *United States* v. *Jones* (7th Cir. 1949), 174 F.2d 748, 749; *United States* v. *Budge* (7th Cir. 1966), 359 F.2d 732.

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Appendix "B"

Judgment of the trial Court

Both judgments are identical and omitting formal parts is as follows:

"It is adjudged that the defendant is guilty as charged.

It is adjudged that the defendant is hereby committed to the custody of the attorney general or his authorized representative for a period of five (5) years on count one (1), and two (2) years on count two (2), said sentences to run consecutively, a total sentence of seven (7) years."

(On the remaining counts three through thirteen the defendants were placed on probation for a period of five years to begin after their release from the sentence imposed on Counts 1 and 2.)

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 398

HOWARD FRANKLIN COBB AND MAURICE F. STEHMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a trial by jury in the United States District Court for the Southern District of Illinois petitioners were convicted on twelve counts charging mail fraud in violation of 18 U.S.C. 1341 and on one count charging them with conspiring to violate the statute. Each petitioner received a five year sentence on count one and a two year sentence on count two, the sentences to run consecutively, and five years' probation on the remaining eleven counts, to commence after the service of the seven-year sentences. The court of appeals affirmed (Pet. App. A).

The sufficiency of the evidence is not questioned.

Essentially, petitioners and two other co-indictees were shown to have established a sham retail business in Quincy, Illinois, and induced a large number of firms to ship them furniture on credit. Despite their assurances that they would pay for the merchandise, petitioners and their co-conspirators intended to, and did in fact, quickly dispose of the furniture for cash through auction houses and the like, conceal the proceeds, fail to pay the suppliers, and close down their operation as soon as continued activity appeared dangerous. The indictment alleged that the Quincy scheme was devised about May 1, 1965, and continued until about March 1, 1966. The mailings and receipt of mail alleged in the indictment all took place within that period. At trial, in addition to the evidence of the transactions averred in the twelve substantive counts of the indictment, the government also introduced proof, directed to the issue of plan and intent, that shortly before they started the Quincy enterprise petitioners had carried on a similar scheme in Denver, Colorado, and that they began still another similar venture in Richmond, Indiana, in March and April of 1966.

In this Court, petitioners raise only two questions, neither of which merits further review. Relying on *McHale* v. *United States* (C.A.D.C. No. 20,598, decided June 11, 1968), they contend (Pet. 8) that it was reversible error to admit evidence of events outside the dates specified in the indictment and involving offenses committed in a different district. But as the court recognized in *McHale* (slip op. p. 5), the test of admissibility of evidence of other crimes involves

a "balancing" process. The court there found reversal warranted because it concluded that the evidence of misconduct within the period framed by the indictment "was not great", the evidence of subsequent misconduct "was not completely relevant," and "the volume of the latter evidence far exceeded that of the former." By contrast, none of these factors is present here. Accordingly, the court below properly found no abuse of discretion in receiving the additional evidence on the question of intent (Pet. App. A. 3). Furthermore, despite petitioners' assertion (Pet. 6) that the trial court failed to give the jury proper limiting instructions on consideration of evidence of similar acts, the record shows that on several occasions when such evidence was introduced, the court did instruct the jury that the evidence was admitted solely to establish intent (Tr. 262, 346, 349, 353), and in its final charge the court gave a clear and accurate instruction on this question (Tr. 442–443).

Petitioners also argue that due process requires that the jury have before it during its deliberations all exhibits and a copy of the instructions, in addition to the indictment. They concede, however, that there is no support for this position in the reported decisions (Pet. 9) and recognize that the record is silent as to whether the jury did or did not in fact have the exhibits in the jury room (Pet. 6–7). In this context, the court of appeals acted reasonably in presuming, in the absence of any objection before the trial court, that the exhibit question was handled properly (Pet. App. A. 5). The decision that supply-

ing the jury with a copy of the instructions is discretionary, not constitutionally required, is also sound. See *McDaniel* v. *United States*, 343 F.2d 785, 789 (C.A. 5).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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